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ABSTRACT

The paper reviews recent court rulings on the appropriateness of programs and services of public school services for handicapped children. Cited are the effects of Section 504 of the Rehabilitation Act of 1973 and P.L. 94-142, the Education for All Handicapped Children Act. The first three sections address litigation in which courts have interpreted school district responsibilities to support private day school and residential placements, extended year programs, and related services for handicapped children. Considered on the topic of private day school and residential placements are placements initiated by the parents and noneducational costs associated with residential placements. Such related services issues as interpreters, psychotherapy, and catheterization are addressed. The final section provides a discussion of trends and their implications for other groups of special needs students and for general education. Topics covered include the potential liability of school districts, the emergence of a backlash movement, and the influence of budgetary concerns. (CL)

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JUDICIAL INTERPRETATIONS OF WHAT CONSTITUTES APPROPRIATE EDUCATIONAL PROGRAMS FOR HANDICAPPED CHILDREN

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ABSTRACT

JUDICIAL INTERPRETATIONS OF WHAT CONSTITUTES
APPROPRIATE EDUCATIONAL PROGRAMS FOR HANDICAPPED CHILDREN

Congress has become increasingly assertive in guaranteeing the rights of handicapped children through legislation such as Section 504 of the Rehabilitation Act of 1973 and The Education for All Handicapped Children Act of 1975. This study was undertaken to analyze litigation interpreting the obligations placed on state and local education agencies to implement these legislative mandates. The judicial interpretation of "appropriate" educational programs is explored in terms of the public school district's responsibility to provide year round instruction, private residential placements, and noneducational services for handicapped children. Implications of the legal mandates for educational policymakers are also addressed.

PREFACE

This paper includes a review of recent judicial rulings in which courts have interpreted the responsibilities of public schools to provide appropriate programs and services for handicapped children. These rulings are analyzed as to their fiscal impact on school districts and their implications for public education in general.

It is important for special education administrators to be cognizant of the ramifications of this recent litigation. Local and state education agencies are faced with increasing fiscal pressure as a result of the legal mandates requiring programs and services to meet the needs (including some noneducational needs) of handicapped students. Unless other public agencies assume a greater share of these costs or federal funds are substantially increased, the fiscal demands placed on public schools may have negative consequences. The recent gains in securing the educational rights of handicapped children may possibly be eroded in a backlash movement. There is mounting sentiment in educational and political forums that unrealistic demands are being placed on schools and that some of the requirements to provide related services for handicapped children are diverting funds from the public school's educational mission.

Special educators need to be aware of these concerns and to collaborate with regular educators as well as with other public agencies to design strategies to resolve the public school's dilemma of increasing demands and decreasing resources. Only with such united efforts can the rights of handicapped children be ensured and can public school delivery systems become more effective and efficient for <u>all</u> children.

JUDICIAL INTERPRETATIONS OF WHAT CONSTITUTES APPROPRIATE EDUCATIONAL PROGRAMS FOR HANDICAPPED CHILDREN

During the past decade substantial progress has been made in ensuring that handicapped children receive an appropriate education at public expense. In the early 1970s, the judiciary relied on the fourteenth amendment equal protection clause in firmly establishing that children with disabilities have a constitutional right to attend school.[1] Because it soon became apparent that this right was an empty victory if appropriate programs and services were not provided for handicapped students once enrolled, Congress and state legislatures began defining the responsibilities of state and local education agencies to meet the special needs of these students.

Two pieces of federal legislation in particular are having a pervasive impact on public schools. Section 504 of the Rehabilitation Act of 1973, a civil rights law, prohibits discrimination against otherwise qualified handicapped individuals in employment, higher education, and elementary and secondary education.[2] Public Law 94-142, the Education for All Handicapped Children Act of 1975 (EHA), focuses specifically on the educational rights of handicapped children and provides federal funds to defray some of the excess costs associated with special education services.[3] Using the federal laws as a model, state legislatures also have become increasingly explicit in delineating the educational rights of handicapped children.

Courts have been quite active in interpreting the federal and state statutory mandates regarding the extent of the school district's obligation to meet the needs of handicapped students. Although legislative provisions

are specific in requiring the development and implementation of individualized educational programs (IEPs) for handicapped children and in mandating strict adherence to procedural safeguards in connection with placement changes, the statutory directives do not specify the particular components of the programs and services that must be provided. The individualized programs are to be determined by local planning groups and are expected to vary according to each child's unique needs. If conflicts arise within these planning groups, administrative appeal procedures are available for dispute resolution. However, when administrative appeals are exhausted without resolution of the controversies, courts often must determine what constitutes "appropriate" educational opportunities for particular pupils. This litigation has significant educational and fiscal implications because additional responsibilities are being placed on school districts to make special provisions for the handicapped no matter how severe the disability and regardless of the costs involved.[4] Moreover, such cases are likely to be used as precedent by other children with special needs (e.g., the gifted and culturally disadvantaged) to assert a right to services similar to those mandated for the handicapped. Indeed, it may be that all pupils ultimately will demand assurances that educational programs are appropriate to meet their needs.

Due to the importance of the judicial role in clarifying vague statutory language and assessing whether specific school practices satisfy legislative directives, this study was undertaken. Specifically, the investigation has focused on litigation pertaining to the responsibility of state and local education agencies to support special programs and services for handicapped children. The following questions have guided this research:

A. What requirements are being placed on public schools to serve handicapped students?

1. Under what circumstances is a handicapped child entitled to a private school placement?

2. Must the public school district incur all costs associated with a residential placement for a handicapped child?

3. Must summer school programs be provided at public expense for handicapped children needing such extended year services?

4. Are school districts obligated to meet the noneducational needs (e.g., catheterization services, psychotherapy services, custodial care) of handicapped students?

B. What are the implications of these judicial rulings?

1. Are handicapped children entitled to optimum programs and services, designed to "maximize their learning potential," or will the provision of minimally adequate programs and services satisfy legal requirements?

2. Can trends be identified as to judicial interpretations of the rights of handicapped students?

3. What are the implications of this judicial activity for other groups of special need students (e.g., English-deficient, gifted) and for public schools in general?

Sources used to identify relevant cases were the American Digest System, the National Reporter System's advance sheets, the LEXIS computer system, and the Education for the Handicapped Law Report. The analysis was limited to judicial interpretations of what constitutes appropriate programs and services for handicapped children. Thus, cases pertaining to topics such as the procedural rights of handicapped children and their parents and the application of disciplinary regulations to handicapped students, although important, were not systematically reviewed.

This paper is divided into four sections. In the first three sections, litigation is reviewed in which courts have interpreted the responsibilities of school districts to support private day school and residential placements,

extended year programs, and related services for handicapped children. The analysis focuses on representative cases or cases with a particular fiscal impact on public schools. The final section entails a discussion of the judicial trends and their implications for other groups of special need students and for public education generally. Topics covered in this section include: judicial standards for assessing whether programs are appropriate, potential liability of school districts, backlash movement, budgetary concerns, and federal/state and legislative/judicial relationships.

Private Day School and Residential Placements

The federal mandates are explicit in affording handicapped children a right to a private placement if appropriate programs are not available in public facilities; however, the scope of the public school's responsibility to support such private placements remains the source of controversy. Many issues have been litigated pertaining to the public school's obligation to incur the total costs for private day or residential placements for handicapped children. Can states establish a ceiling on the amount of reimbursement to parents for such private placements? Can parents receive reimbursement if they do not follow state procedures in placing their child in a private facility? Must all maintenance costs associated with private placements be incurred by the public school? Must out-of-state placements be provided if appropriate programs are not available within the state?

State-Prescribed Procedures

Some states have prescribed detailed procedures that must be followed in placing handicapped children in private facilities. Courts have ruled that parents are entitled to reimbursement for private school tuition for their child only if state laws regarding such placements are followed. In 1978, a New York appeals court denied reimbursement to parents because their child was not attending a state-approved private school and the parents had not

adhered to the established procedures for enrolling children in private schools.[5] In another New York case, a trial court noted that unreasonably costly private schools should be eliminated during the state approval process.[6] However, the court held that as long as a handicapped child was enrolled in a state-approved school and correct procedures had been followed, a municipality could not refuse to pay part of the child's expenses on the grounds that the charges were excessively expensive.

Some legal controversies have revolved around state efforts to establish limits on the amount of reimbursement that parents can receive for the education of their handicapped children in private facilities. In 1978, the Florida Supreme Court upheld the state education department's authority to establish a maximum amount for the support of exceptional students placed in private schools.[7] The court reasoned that the establishment of a maximum reimbursable amount did not impair any protected rights of the students or their parents. The court recognized, however, that it was incumbent on educational authorities to ensure that the ceiling was sufficiently high so that handicapped children were not deprived of a free appropriate education.

In contrast to the Florida Supreme Court's position, most other courts have concluded that when a school district places a handicapped child in an approved private facility, such placement must be at no cost to the parents. For example, an Illinois appeals court invalidated a state statute that established a maximum reimbursable amount for educating a child in a private facility as abridging the state constitutional mandate that education through the secondary level must be free for all persons, including handicapped individuals, residing within the state.[8] Similarly, the Connecticut Federal District Court ruled that recommended private

placements for handicapped children must be supported by the school district.[9] Other courts have reiterated that parents cannot be required to incur the costs of educating their handicapped children in private institutions as long as proper placement procedures have been followed.[10]

Placements Initiated by Parents

Although courts have held that the school district of the handicapped child's residence is responsible for providing a free, appropriate education for the child either in a public or private facility, parents cannot unilaterally decide that a private placement is necessary. In an illustrative 1979 case, a Pennsylvania court denied a petition for parental reimbursement for an out-of-state placement for their socially and emotionally disturbed child.[11] The parents, on their own initiative, had enrolled the child in a Connecticut school and would not make the child available for an evaluation to determine if an appropriate placement could be made within Pennsylvania. Thus, the court ruled that the parents were not entitled to tuition reimbursement for the child's private placement.

In 1980, the Fourth Circuit Court of Appeals similarly recognized that parents who unilaterally removed a child from a recommended placement were not entitled to reimbursement for expenses incurred at a private school.[12] Other courts have recognized that parents have the burden of proving that the school district's proposed placement is inappropriate in order to establish a basis for reimbursement for private school costs.[13] For example, in a 1979 Missouri case, an appeals court denied parents reimbursement for their handicapped child's tuition in a private institution because a suitable public school program was available.[14] Likewise, the Minnesota Federal District Court rejected a parental claim for reimbursement based on evidence that the

local education agency was willing to revise a child's IEP to meet legal requirements.[15] A New York court also concluded that a child who was shy, withdrawn, and subject to periods of delusion, anxiety, and depression was not entitled to a state-supported private school placement as there was no showing that the child's needs could not be met in the public school system.[16] The Oregon federal district court similarly ruled that parents were not entitled to reimbursement for a private placement because the public school district offered appropriate special education and related services for the child.[17] And a Massachusetts appeals court denied reimbursement because there was insufficient evidence that the public school program would not benefit the child to the "maximum extent" while retaining him in the least restrictive environment.[18]

However, courts have ordered parental reimbursement for private placements in situations where parents have exhausted all available remedies before placing the child in a private facility. In an illustrative case, the Connecticut Supreme Court awarded reimbursement to parents because the private placement was necessitated by the inaction of the public school district in securing an appropriate program for the child.[19] The federal district court in the District of Columbia also concluded that the education agency was obligaced to support a private placement initiated by parents because school personnel were derelict in determining an appropriate program for the child.[20]

Noneducational Costs Associated with Residential Placements

In situations where evidence has been produced that public school programs or private day programs are not appropriate for particular children, residential placements have been judicially required.[21] Furthermore, courts have recognized that budgetary constraints cannot be used as a defense for

failing to arrange for needed residential placements.[22] In some instances, handicapped children have been placed in out-of-state facilities and the home school district has been held responsible for the costs. For example, a state court reasoned that a New York school district was fiscally responsible for the placement of a severely multiply handicapped child in a residential facility in Florida. The New York education department had refused approval of the placement on the grounds that it mainly involved custodial care and was not primarily for educational purposes.[23] The family court disagreed, concluding that the private facility provided an individualized educational program as well as custodial care. The court held that the child's needs could not be met in her own community and that the out-of-state private placement was appropriate. The Connecticut Federal District Court also ruled that a school district was obligated to support a residential placement even though the placement was in part for noneducational reasons.[24]

In contrast, the Supreme Court of New Jersey concluded that a school district was not obligated to incur the total expense of a residential placement for a severely retarded teenage child.[25] Parents alleged that the practice of charging parents for institutional care and maintenance costs, based on ability to pay, violated their protected rights. The court reasoned that the care of a sub-trainable child does not qualify as education and that the institutional placement was primarily custodial in nature. Finding no state or federal requirement that the education agency must incur maintenance costs necessitated by the student's home conditions (rather than educational concerns), the court ruled that the state was not precluded from requiring financially able parents to bear such costs for care of their child.

The court did recognize, however, that the parents were entitled to a credit for any educational services provided for the child. Accordingly, the case was remanded for a determination of the amount of the educational credit that should be allowed.

Relationships Among Public Agencies

Public Law 94-142 stipulates that the state education agency is accountable for ensuring that all handicapped children within the state are being properly educated. This includes monitoring programs which are provided for handicapped children by other private or public agencies. Legal controversies have arisen as to the fiscal responsibilities of the various agencies involved in delivering services for particular children.

A 1979 decision in the District of Columbia addressed the question of which public agency must incur the costs of residential care for a multiply handicapped teenage boy placed outside his home school district.[26] The school board argued that while the child's emotional problems necessitated a residential setting, his educational needs could be met by attendance at a special day program provided by the school district. Accordingly, the board asserted that the child's emotional needs were the responsibility of the Department of Human Resources rather than the public school. The federal court concluded that while different agencies may in fact deliver services for handicapped children, the responsibility to oversee the education of such children must remain centralized in the education agency. Thus, the court relied on EHA and Section 504 in holding that the school district was obligated to support an appropriate residential placement for the child.

More recently, the Third Circuit Court of Appeals followed similar reasoning in holding that a Delaware School District was obligated to support a residential placement, including noneducational costs, for a handicapped child.[27] School authorities asserted that the noneducational needs of the student were the responsibility of other state agencies, but the court disagreed. Noting that EHA specifically assigned responsibility for handicapped children to the schools, the appellate court concluded that the school district was fiscally obligated to support services to address the child's social and emotional as well as educational needs. While courts have recognized that school districts can enter into agreements with other state agencies to share the costs of providing services for handicapped children,[28] the judicial trend appears to be toward placing the primary responsibility for meeting these children's needs on education agencies.

Location of Educational Programs

Several issues pertaining to where educational programs are provided for the handicapped have generated recent litigation. It has been argued that institutional placements and placements outside the individual's home community cannot be considered the least restrictive environment. A New York federal district court concluded that the state must provide funds for certain mentally retarded children to be transferred from an institution to their natural homes in order to obtain the most normal living conditions possible.[29] The court further noted that the use of public funds to support such home placements does not unlawfully usurp parents' obligation to support their minor children.

In a case of first impression, the Third Circuit Appellate Court held that residents of a Pennsylvania hospital for the mentally retarded must be placed to the extent appropriate in "community living arrangements" which more closely resemble natural home environments.[30] The court concluded from the evidence presented that many of the hospital residents were being denied their federally

protected right to appropriate treatment. However, the court rejected the assertion that the institution should be closed. It recognized that if the hospital conditions were improved, it could provide an appropriate placement for some severely handicapped individuals. The United States Supreme Court has heard oral arguments in this case, and its decision should clarify some of the issues pertaining to institutionalization of the handicapped.

In a Virginia case, the issue involved the proximity of a handicapped child's placement to his home, rather than institutionalization per se. The parents asserted that an out-of-county residential setting was not the least restrictive environment for their child who could not benefit from frequent parental visitation due to being placed outside the home community.[31] The federal district court concluded that a school district is not obligated to provide a program in the child's home community if an appropriate out-of-district program is available to meet the child's needs.[32]

Most of the controversies over the location of programs have involved challenges to the placement of handicapped persons in segregated institutions or in facilities some distance from the individual's home. A recent New York case, however, involved a challenge to a school board's decision to close a special school for the handicapped within the district. Due to budget constraints, the special school was closed and the handicapped pupils were transferred to other schools in the system.[33] The Second Circuit Court of Appeals concluded that the transfer did not impair the students' rights as their classification was not altered and they were provided similar educational programs in the receiving schools. The court reasoned that the transfer involved only location and not type of educational services provided. The

United States Supreme Court declined to review this case and thus left the appellate decision intact.

Summary

While the scope of the school district's responsibility to support private day and residential placements for handicapped children remains the source of substantial litigation, the following generalizations seem warranted at the present time:

1. The school district of the handicapped child's residence is fiscally responsible for a private placement if an appropriate program for the handicapped child is not available in a public facility.

2. The school district is responsible for total maintenance costs associated with a private placement unless clearly demonstrated that the placement was not made in part for educational reasons.

3. Parents are not entitled to reimbursement for tuition and or maintenance costs associated with a private placement if they do not follow state procedures in making such placement.

4. The least restrictive environment for any given child might include placement outside the child's home community; however, efforts should be made to ensure that the placement involves the most normal living arrangements possible.

Provision of Year Round Programs

A controversial issue involves the responsibility of public education agencies to provide services for handicapped children during the summer months. New York courts have been quite active in addressing this issue.

In 1977, a New York appeals court upheld the commissioner of education's interpretation of state law as not requiring school districts to provide year round instruction for handicapped children.[34] In this and subsequent New York decisions, however, it has been recognized that family courts can direct municipalities to support summer programs if considered necessary to meet the educational needs of specific handicapped children.[35] For example, parents have received tuition reimbursement for physically handicapped children to attend summer camps if substantiated that the camps offer essential services for the children's education.[36]

Several of the New York decisions have addressed the responsibility of parents to pay the summer maintenance costs for children placed in residential facilities. Until 1976, New York law authorized family courts to compel parental contribution toward the maintenance costs for handicapped children during the summer months.[37] In 1976, however, an amendment placed the responsibility on municipalities to incur the maintenance costs for handicapped children enrolled in private facilities year round. Interpreting this law in 1979, a family court ruled that parents could not be charged for summer maintenance costs for their child who was confined to a residential school for the entire year.[38] The court also interpreted EHA as requiring maintenance charges to be incurred by the local education agency for the summer if a child's needs warrant year round residential placement. In another 1979 decision, a family court ruled that parents were entitled to full reimbursement for costs associated with their handicapped child's special education, including tuition, related services, maintenance, and transportation for the summer months.[39]

While New York has produced the greatest number of cases involving the provision of extended year programs for handicapped children, the most significant decision on this topic has involved a Pennsylvania administrative regulation. In Armstrong v. Kline, the Third Circuit Court of Appeals agreed with the federal district court's conclusion that a Pennsylvania administrative policy establishing a limit of 180 days of instruction per year for all children violated EHA.[40] The district court had invalidated the 180 day rule as interfering with the federally mandated goal of maximizing the self-sufficiency of each disabled child.[41] While the appeals court affirmed the district court's holding, it differed as to rationale. The appellate court interpreted EHA as placing the responsibility on the state to establish educational goals for handicapped children and reasonable means to attain the goals. Accordingly, the appeals court concluded that the 180 day rule violated the Act by precluding proper formulation of goals for severely handicapped children in need of extended services.

Relying in part on the Armstrong decision, an Oregon appeals court held that a school district was obligated to support a year round residential placement for a child whose needs clearly dictated that such a placement was necessary.[42] The court further noted that while local decision-makers have some discretion in determining what programs are appropriate for specific handicapped children, EHA requires that the programs be provided at no expense to parents. In contrast to the Oregon situation, a Wisconsin federal district court concluded that a school district was not obligated to support a summer program for a handicapped child who had a history of continuous educational progress.[43] The court reasoned that an appropriate educational program was being provided without extended year services.

The Armstrong decision has been appealed to the United States Supreme Court, and the final resolution of this issue may have significant fiscal and legal implications for public schools. Pennsylvania education officials have asserted in their brief to the Supreme Court that present public school resources are insufficient to implement the appeals court ruling.[44] It has been further argued that if the appellate court ruling is allowed to stand, it may weaken the nation's public schools by diverting funds from the regular education program. In the appeal, the Supreme Court has been asked to clarify the scope of the public school's mission and to specify uniform standards to use in determining what programs and services are legally required for handicapped children. Since this litigation is currently in progress, it seems premature at this time to offer any generalizations as to the public school's responsibility to provide extended year programs for handicapped pupils.

Related Services

Under EHA, handicapped children are entitled to "specially designed instruction at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions."[45] Furthermore, education agencies must provide related services such as transportation and developmental, corrective, and other supportive services necessary for a child to benefit from special education.[46] A great deal of recent litigation has focused on clarifying the specific types of related services that are legally required.

Since transportation services are specifically included in the Act, it has been firmly established that school districts must incur the costs of transporting handicapped children to receive educational services. Even though school districts have asserted that such transportation costs are placing a substantial strain on school budgets, courts have shown little sympathy when lack of funds has been proffered as a rationale for denying such services to the handicapped.[47]

Interpreter Services

An issue which has frequently been the source of litigation is whether or not interpreter services must be provided for deaf students.[48] In an action against the University of Texas, a federal district court granted injunctive relief to a hearing-impaired graduate student, noting that he was an otherwise qualified individual deserving of auxiliary assistance under Section 504.[49] However, the court conditioned relief on the plaintiff's filing of an administrative complaint with the Department of Health, Education, and Welfare. On appeal, the Fifth Circuit Court of Appeals affirmed the lower court's ruling on the injunction but vacated the part of the order requiring the filing of an administrative complaint. The appellate court concluded that the exhaustion of administrative appeals before initiating court action is not necessary when civil rights, such as those guaranteed by Section 504, are at stake.[50]

The Fifth Circuit Appellate Court distinguished the Texas case from a United States Supreme Court decision in which a nursing program was not required to admit a hearing-impaired applicant or to alter its program to accommodate individuals who could not meet course requirements.[51] The Texas

graduate student clearly demonstrated that he could benefit from the training program if given special assistance, whereas the hearing-impaired applicant to the nurse's training program failed to establish that she would be able to perform successfully as a nurse despite her disability.

Although much of the legal activity regarding the provision of special assistance for hearing-impaired students has involved higher education, in a New York case, a sign language interpreter for an elementary hearing-impaired student was requested.[52] Since the child was making above average progress in the regular classroom and had resisted interpreter services during a trial period in kindergarten, school officials contended that there was no need for special assistance. However, the federal district court and subsequently Second Circuit Court of Appeals disagreed. The courts reasoned that although the child was performing well in school, she was understanding "considerably less of what goes on in the classroom than she could if she were not deaf."[53] Thus, while her education was considered adequate without an interpreter, the courts concluded that it would be more appropriate with the special assistance. The district court specifically held that in order for the child to be afforded an educational opportunity commensurate with that offered to her nonhandicapped classmates, the school must provide the special services sought. The Supreme Court has been asked to review this case and decide whether the lower courts have placed an overly burdensome responsibility on the public school.

Psychotherapy and Catheterization Services

Much debate has centered on the issue of whether education agencies must pay for noneducation services for handicapped pupils. In a significant Washington, D.C. case, the federal district court ruled that the school system must incur the costs for the residential placement of a handicapped child, including psychiatric, psychological and medical support and supervision.[54] The court noted that the student's educational, emotional, and medical needs were so intimately entwined, that it could not perform the "Solomon-like task" of separating them.

The Montana Supreme Court similarly concluded that the education agency was responsible for providing psychotherapy services for a handicapped child.[55] Using the dictionary definition of psychotherapy ("treatment of mental or emotional disorders or of related bodily ills by psychological means"), the court reasoned that psychotherapy comes within the psychological services guaranteed to handicapped students under EHA.[56] Although the court recognized that the provision of such services was expressly excluded from the state law, it concluded that EHA was controlling in placing an obligation on school districts to support these services. An Illinois federal district court also concluded that counseling, psychological, and social work services must be provided for handicapped children.[57] In a Massachusetts case, a superior court held that an IEP could include the services of a particular psychologist to perform family guidance and counseling if necessary to meet the child's needs.[58]

The provision of catheterization services has also generated legal controversies, and until recently had evoked conflicting lower court rulings.[59]

In 1979, a Texas federal district court interpreted federal mandates narrowly in concluding that the school district was not obligated to provide catheterization services.[60] However, the Fifth Circuit Court of Appeals overturned this ruling and held that such services must be provided if necessary for the child to participate in the educational program. In January, 1981, the Department of Education issued a policy statement stipulating that catheterization is a related service, not a medical service, and thus must be provided under EHA.[61]

Summary

The scope of the public school district's responsibility to provide related services for handicapped children, including noneducational as well as educational services, has not been clearly delineated. Nonetheless, the following principles have emerged from recent judicial interpretations of statutory guarantees:

1. Public school districts must incur the total costs of transportation necessary for handicapped students to receive educational services.

2. Hearing-impaired students are entitled to sign language interpreters.

3. Related services that must be provided include catheterization and psychotherapy if such services are necessary for handicapped children to benefit from educational programs.

4. Other noneducation costs, including some medical costs, may be the responsibility of the education agency if a student's educational needs cannot be addressed appropriately without the related services.

Implications of the Emerging Judicial Standards

Since federal and state statutes do not provide clear guidelines for assessing whether given programs are indeed appropriate for specific handicapped children, courts are being called upon to resolve conflicts over what services must be provided. Courts have recognized that when controversies arise, the final determination of whether or not a program is appropriate must be made by the judiciary.[62] While this litigation is in its embryonic stage, its educational and fiscal implications seem destined to reach far beyond the handicapped. Other groups of special need students, such as the English-deficient and gifted, are beginning to capitalize on the mandates on behalf of the handicapped in seeking programs tailored to their unique needs. Indeed, all pupils may eventually be affected by these mandates.

For example, if the Supreme Court should decree that handicapped children are entitled to year round instruction if their needs dictate, it seems likely that other pupils will demand such extended year services. Most children could establish that some regression occurs during the summer break from school. Therefore, it may soon be asserted that universal summer school should become a regular component of public school offerings. In 1979, the Georgia Supreme Court rejected this assertion and held that the policy of charging summer school tuition fees for regular education students did not violate any state or federal constitutional guarantees.[63] However, if established that handicapped children are entitled to such services at public expense, it appears that nonhandicapped students who are denied free summer school might have a valid equal protection claim.

The requirement that handicapped children must be placed in private facilities if appropriate programs are not available in the public forum also has massive implications for public schools in general. Court rulings requiring school districts to pay maintenance costs and to support noneducation services associated with residential placements for handicapped children are causing significant budgetary strains. Currently, the primary burden for such costs is being placed on education agencies rather than on other public agencies. Since school districts have been required to support out-of-district and even out-of-state residential placements for handicapped children in order for the programs to be considered appropriate, possibly other special need students will assert a right to similar treatment. For example, gifted and talented pupils may begin seeking placement in private schools if substantiated that the public school's program is not sufficiently challenging.

Allegations that every student is entitled to an individualized educational program also may be in the not-too-distant future. Already, a small school system in Nebraska has reported positive results from its use of IEPs for all pupils within the district.[64] Nebraska has made state funds available for other school systems that wish to pilot test such a program. Also, a Wisconsin statute suggests, but does not require, that the equivalent of an IEP be developed for truant students.[65] If state legislatures ultimately should stipulate that schools must provide an individualized educational program for each child and ensure that services are appropriate to meet the unique needs of all pupils, a substantial increase in educational funds would be required. Also, it would be necessary to develop more sophisticated funding formulas to reflect the differential costs associated with addressing the range of student needs.

Judicial Standards for Assessing Whether Programs Are Appropriate

The judiciary plays a pivotal role in clarifying statutory protections and assessing what programs and services are required in order for educational offerings for the handicapped to be considered appropriate. It seems clear that "appropriate" means more than merely providing access to "some" educational opportunity. However, it seems unlikely that "appropriate" means that each handicapped child is entitled to the best possible programs and services available. What is not clear is where on the continuum between these extremes lies the acceptable definition.

In an Arkansas case, the federal district court noted that the state school for the deaf offered the best program for a particular handicapped child. However, since the local education agency provided a suitable program to meet the child's needs, the court concluded that the child should be enrolled in the local school district.[66] Thus, the court reasoned that as long as an adequate program was provided, legal mandates were met. Similarly, a Pennsylvania commonwealth court held that a handicapped child was not entitled to a "more appropriate" program as long as an appropriate program was made available.[67]

Other courts, however, have taken a different view as to whether minimally adequate or optimum programs must be provided. For example, a Massachusetts appeals court reasoned that a program must benefit a handicapped child to the "maximum extent feasible" in order to be considered appropriate.[68] A Pennsylvania federal district court espoused the position that programs for handicapped students must maximize the children's chance to reach self-sufficiency and "ultimately enable them to participate as fully as possible in

appropriate activities of daily living."[69] Similarly, the Delaware Federal District Court interpreted EHA as requiring school districts to provide programs that "maximize" each handicapped child's chance of learning,[70] and a New York federal district court ruled that services must enable handicapped children to reach their full learning potential commensurate with the opportunity provided for nonhandicapped children.[71]

In 1980, a Kentucky federal court relied on EHA in concluding that school districts must furnish the optimum in the way of education to those to whom "nature has dealt less than a full hand."[72] That same year, an Indiana appeals court held that a treatment plan, characterized by experts as the "best possible" program, was in fact the only appropriate plan due to the severity of the person's handicap.[73] If the Supreme Court ultimately should decree that local education agencies are obligated to provide optimum programs to enable handicapped children to reach their full learning potential, it seems likely that other special need students (and perhaps all students) will begin seeking similar consideration.

Potential Liability of School Districts

Since legislative and judicial mandates are becoming more explicit in delineating the public school's responsibilities, this legal activity may strengthen the grounds for aggrieved students to obtain compensatory damages from school districts. The Supreme Court has ruled that plaintiffs can seek monetary damages from units of government, including school districts, for violations of federal statutory rights under Section 1983 of the Civil Rights Act of 1871.[74] Furthermore, in 1980, the Court declared that municipalities and school boards cannot plead good faith as a defense in such civil rights actions.[75] The federal mandates on behalf of the handicapped may nurture

an increase in damage suits initiated under Section 1983. If it can be substantiated that school districts are not fulfilling their statutory obligations, handicapped students might have a legitimate entitlement to compensatory relief.

In addition to bringing damage suits under Section 1983, handicapped students may begin using the federal protections as a basis for seeking monetary awards from school districts for instructional negligence. While educational malpractice suits on behalf of the nonhandicapped have not been successful to date,[76] suits initiated under EHA may find a more receptive judicial forum. Courts have not held schools responsible for ensuring student literacy, but they may be inclined to award relief if school districts are negligent in carrying out statutory directives. Possibly, handicapped plaintiffs will be able to obtain damages if the prescribed services are not provided or if the school's program does not produce the promised results.

Backlash Movement

Currently, a double standard appears to be operating in assessing the adequacy of programs for the handicapped in contrast to programs for the general public school population. Programs for the handicapped must be appropriate to meet the educational and even noneducational needs of disabled students. The IEP and due process requirements are designed to ensure that appropriate programs are provided for these students. In contrast, the general education program usually is considered sufficient if it satisfies minimum state input requirements (e.g., prescribed course offerings, teacher qualifications, pupil-teacher ratios). As special interest groups continue to vie for the limited fiscal resources and for guarantees that educational programs are appropriate for their respective constitutencies, mounting fiscal strains are being placed on school districts.

There is some fear that the spiraling legal activity on behalf of handicapped students (with its accompanying awesome price tags) will result in a wave of backlash legislation and litigation. This sentiment already is apparent among critics of several of the federal requirements. For example, the mandated IEP has been criticized as usurping teacher time that should be devoted to the general education program. A New York federal district court has noted that the federal and state mandates on behalf of handicapped children "may necessitate a sacrifice in services now afforded children in the rest of the school system."[77] Also, the National School Boards Association has questioned whether Congress intended to require school districts to provide sufficient time, money, and effort to assure that handicapped children reach their potential even though such efforts may result in the denial of educational services to nonhandicapped pupils.[78] Perhaps law suits alleging that nonhandicapped students are being deprived of their equal protection rights will soon be initiated.

Budgetary Concerns

Although there are federal funds available to defray some of the excess costs associated with meeting the needs of disabled pupils, the major fiscal burden still remains with state and local education agencies. The 1982 federal budget authorizes funds for approximately 12 percent of the excess special education costs. In announcing the budget, education department officials emphasized that the provision of special education services is the primary responsibility of state and local education agencies.[79] Courts have been unsympathetic when school districts have used "lack of funds" as the rationale for denying the educational rights of the handicapped.[80]

For example, in 1979, an Oregon appeals court declared that local school officials have some discretion in determining what constitutes appropriate programs, but once such determinations are made, the programs must be provided free.[81] Also, a California federal district court noted that it is worth the financial strains placed on school districts to develop the potential of the handicapped.[82] Similarly, a New York federal district court held that "only when the financial burden upon the state becomes prohibitive should the court stay its hand."[83] In 1980, a Massachusetts judge ordered the city of Boston to comply with state law by fully funding required special education programs, noting that fiscal pressures could not be the basis for depriving handicapped children of their educational rights.[84] The same year, an Indiana appeals court declared that a desire to conserve state funds cannot be used as a justification for withholding appropriate treatment from a handicapped individual.[85]

In two appeals before the United States Supreme Court, it is being argued that unrealistic demands are being placed on school districts to meet the needs of handicapped pupils. One of these appeals involves the New York case, in which the Second Circuit Court of Appeals required a school district to provide a sign language interpreter for a child who was making above average progress without such special assistance. It has been asserted that the provision of interpreters for all hearing-impaired children in the state will cost $100 million annually.[86] In the other appeal, the provision of summer school programs for severely handicapped children (ordered by the Third Circuit Court of Appeals) is being contested. In a friend of the court brief, the National School Boards Association has argued that the precedent set by the Third Circuit Appellate Court "affects every school board in the country and could result in a major revision of the very nature of the public

educational system."[87] The Association also has estimated that it will cost $830 million annually to run extended-year special education programs in this nation. In these appeals, the Supreme Court is being asked to consider the massive fiscal implications of the lower court rulings and their potential impact on the general education program.

Federal/State and Legislative/Judicial Relationships

The legal activity pertaining to the educational rights of the handicapped also has profound implications for the federal/state relationship in establishing standards for public schools and for the role of the judiciary in delineating the components of required public school offerings. While the Federal Constitution grants no explicit authority to the federal government in the educational domain, Congress has had an increasingly significant influence on public schools through its authority to enact legislation to clarify individuals' constitutional rights. Federal regulatory agencies, in turn, have promulgated extensive regulations pursuant to such statutory mandates. Some local and state education agencies as well as national education associations have asserted that the federal government has acted beyond its authority in certain instances by determining what is taught and how it must be delivered by public schools.[88] As legislative and administrative directives become increasingly detailed, this tension between levels of government is likely to become more pronounced.

Also, a new judicial role in determining educational offerings may emerge from the legal activity on behalf of the handicapped. Traditionally, courts have been reluctant to prescribe the components of a state's basic education program and have deferred to legislatures to make such determinations.

In the latter 1960s courts rejected the assertion that educational funds must be allocated according to the needs of students, reasoning that there were "no discoverable and manageable standards" under the Federal Constitution by which a court could assess whether students' needs were being adequately addressed.[89] However, recently courts have been willing to enter this political thicket and, relying on statutory provisions, have evaluated whether particular educational programs satisfy legislative guarantees. Will courts become more assertive in delineating the precise programs and services that must be provided by public schools? Do courts provide the proper forums for such technical decisions to be made, or should large scale social issues be handled in legislative arenas which are presumably less adversarial than courtrooms? In recent appeals to the United States Supreme Court, the judiciary is being asked to give substance to vague statutory language and provide specific guidelines that can be used to assess program adequacy for handicapped children. If the Supreme Court does provide the criteria requested, it may be that the judicial role in determining educational policies and practices will become increasingly prominent.

Conclusion

The legal mandates on behalf of handicapped pupils may force some consensus as to the purpose of public education and the types of student needs that should be addressed by public schools. Possibly, education agencies are attempting to perform some functions that could be handled more effectively and efficiently by other public agencies. Without clear priorities for public education, the components of the instructional program may be determined by

the lobbying efforts of special interest groups who have been thrust into competition for limited educational resources.

It seems clear that the federal government cannot be relied upon to foot the bill in providing the mandated services for the handicapped and other special need students. Moreover, in the aftermath of Proposition 13, tax limitations measures are being introduced in many states and bond issues and operating levies continue to fail. The total percentage of the gross national product devoted to education decreased from 4.6 percent in 1975 to 4.1 percent in 1979.[90] And, it is unlikely that funding sources for local and state education agencies will increase appreciably in the near future.

Is it realistic to place greater and greater demands on public schools without making fiscal resources available to meet the demands? Are program requirements being placed on schools in regard to special need students without proper attention to the effects of such requirements on the overall educational system? Are public schools being asked to provide some services that should not be their responsibility? Is there concensus as to what functions public schools should and <u>can</u> perform? These and related questions need to be addressed by educators and policymakers at all levels of government. Without answers to such questions, it may be that the gains made in protecting the rights of the handicapped will be eroded in a wave of backlash legislation. Or it may be that all public school offerings will be diluted if the paradox of increasing demands and decreasing resources is not soon resolved.

Footnotes

1. See Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972); Pennsylvania Ass'n for Retarded Children v. Commonwealth, 343 F. Supp. 279 (E.D. Pa. 1972).
2. 29 U.S.C. § 794 (1976).
3. 20 U.S.C. § 1401 et seq. (1976).
4. See Hines v. Pitt City Bd. of Educ., 3 EHLR 552:247 (E.D. N.C. 1980); In the Matter of Charles Hartman, No. 3-379 A60 (Ind. App. 1980); North v. District of Columbia Bd. of Educ., 471 F. Supp. 136 (D.D.C. 1979); Matter of "A" Family, 602 P.2d 157 (Mont. 1979).
5. Pilato v. New York State Depart. of Educ., 406 N.Y.S.2d 562 (App. Div. 1978).
6. Meyer v. City of New York, 392 N.Y.S.2d 468 (App. Div. 1977).
7. Scavella v. School Bd. of Dade County, 363 So. 2d 1095 (Fla. 1978).
8. Elliot v. Board of Educ. of City of Chicago, 380 N.E.2d 1137 (Ill. App. 1978). In Virginia, a federal district court invalidated a state law because it allowed only partial reimbursement for handicapped children placed in private educational programs where appropriate services could not be obtained in the public schools. If parents were unable to pay the remaining costs, local social service departments accepted legal custody of the handicapped children and placed them in foster care for the purpose of providing state financial assistance for the needed private school instruction. The federal court concluded that the statute violated the equal protection clause and interfered with the fundamental right to family integrity, Kruse v. Campbell, 431 F. Supp. 180 (E.D. Va. 1977). On appeal, the United States Supreme Court dismissed the constitutional issues and remanded the case for reconsideration

under Section 504 of the Rehabilitation Act, 434 U.S. 808 (1977). The district court reversed its position upon reconsidering the case [(No. 75-0622-R (E.D. Va. 1978)], reasoning that the state was not required to pay the full cost of private schooling for handicapped children prior to September, 1978, the implementation date for Section 504. Despite the ruling, the tuition reimbursement statute subsequently was revised to provide full funding of private education for handicapped children needing services not offered in public schools.

9. Michael P. v. Maloney, 3 EHLR 551:155 (D. Conn. 1979).

10. See Capello v. Dist. of Columbia Bd. of Educ., 3 EHLR 551:500 (D.D.C. 1980); Grymes v. Madden, 3 EHLR 552:183 (D. Del. 1979); Matthews v. Campbell, 3 EHLR 551:265 (E.D. Va. 1979); Ladson v. Board of Educ., 3 EHLR 551:188 (D.D.C. 1979).

11. Welsch v. Pennsylvania, 400 A.2d 235 (Pa. Commw. 1979).

12. Stemple v. Board of Educ. of Prince George's County, 464 F. Supp. 258 (D. Md. 1979), aff'd 623 F.2d 893 (4th Cir. 1980), cert. denied 49 U.S.L.W. 3617 (Feb. 23, 1981).

13. See Breedon v. Maryland State Depart. of Educ., 3 EHLR 551:563 (Md. App. 1980). See also Lakfo v. Wappingers Central School Dist., 427 N.Y.S.2d 529 (App. Div. 1980).

14. Moran v. Board of Directors, School Dist. of Kansas City, 584 S.W.2d 154 (Mo. App. 1979). See also Lux v. Connecticut, 386 A.2d 644 (Conn. C.P. 1977).

15. Laura v. Special School Dist. No. 1, 3 EHLR 552:152 (D. Minn. 1980).

16. In re Joseph, 366 N.Y.S.2d 259 (Family Ct., Queens County, 1975).

17. Chatterton v. Lincoln County School Dist., 3 EHLR 551:548 (D. Ore. 1979). See also Krawitz v. Commonwealth of Pennsylvania, 408 A.2d 1202 (Pa. Commw. 1979).

18. Isgur v. School Committee of Newton, 3 EHLR 552:197 (Mass. App. 1980).

19. Board of Educ. of the Town of Manchester v. Connecticut State Bd. of Educ., 3 EHLR 551:556 (Conn. 1980).

20. Parker v. Dist. of Columbia Bd. of Educ., 3 EHLR 551:267 (D.D.C. 1979). See also North v. District of Columbia Bd. of Educ., 471 F. Supp. 136 (D.D.C. 1979).

21. See note 10, supra.

22. See Hines v. Pitt City Bd. of Educ., 3 EHLR 552:247 (E.D.N.C. 1980).

23. In the Matter of Suzanne, 381 N.Y.S.2d 628 (Family Ct., Westchester County, 1976). The court noted that testimony indicated that thirty-six schools had been contacted in seeking a placement for the child, and that the Florida private facility was the least expensive institution providing services to meet the child's needs.

24. Erdman v. State of Connecticut, 3 EHLR 552:218 (D. Conn. 1980).

25. Guempel v. State of New Jersey, 387 A.2d 399 (N.J. Super. 1978), aff'd 3 EHLR 552:163 (N.J. 1980).

26. North v. District of Columbia Bd. of Educ., 471 F. Supp. 136 (D.D.C. 1979).

27. Kruelle v. Biggs, 489 F. Supp. 169 (D. Del. 1980), aff'd ___ F.2d ___ (3d Cir. 1981). See also Smith v. Cumberland School Committee, 415 A.2d 168 (R.I. 1980).

28. See Michael P. v. Maloney, 3 EHLR 551:155 (D. Conn. 1979); Mattie T. v. Holladay, No. DC 75-31-S (N.D. Miss. 1977).

29. New York State Ass'n for Retarded Children v. Carey, 466 F. Supp. 479 (E.D.N.Y. 1978).

30. Halderman v. Pennhurst, 446 F. Supp. 1295 (E.D. Pa. 1977), aff'd in part, rev'd in part, 612 F.2d 84 (3d Cir. 1979), oral arguments, 49 U.S.L.W. 3437 (1980).

31. DeWalt v. Burkholder, 3 EHLR 551:550 (E.D. Va. 1980).

32. Courts have recognized that regardless of where the services are provided for a handicapped child, the school district of the child's legal residence is responsible for incurring the costs. See William C. v. Board of Educ. of the City of Chicago, 3 EHLR 551:289 (Ill. App. 1979).

33. Concerned Parents and Citizens for the Continuing Education at Malcolm X v. New York City Bd. of Educ., 3 EHLR 551:535 (E.D.N.Y. 1980), rev'd 629 F.2d 751 (2d Cir. 1980), cert. denied, 49 U.S.L.W. 3493 (1981).

34. Schneps v. Nyquist, 396 N.Y.S.2d 275 (App. Div. 1977).

35. See In the Matter of Frank G., 414 N.Y.S.2d 851 (Family Ct., Queens County, 1979); In the Matter of Scott K., 400 N.Y.S.2d 289 (Family Ct., New York County, 1977).

36. In the Matter of Richard G., 383 N.Y.S.2d 403 (App. Div. 1976).

37. See In the Matter of Stein, 365 N.Y.S.2d 450 (Family Ct., Queens County, 1975).

38. In the Matter of George Jones, 414 N.Y.S.2d 258 (Family Ct., Queens County, 1979).

39. In the Matter of Frank G., 414 N.Y.S.2d 851 (Family Ct., Queens County, 1979).

40. Armstrong v. Kline, 476 F. Supp. 583 (E.D. Pa. 1979), aff'd 629 F.2d 269 (3d Cir. 1980).

41. Id., 476 F. Supp. 583.

42. Mahoney v. Administrative School Dist. No. 1, 601 P.2d 826 (Ore. App. 1979).

43. Anderson v. Thompson, 3 EHLR 552:251 (E.D. Wis. 1980).

44. Education Daily, vol. 14, no. 14, January 22, 1981, p. 1.

45. 20 U.S.C. § 1401 (16) (1976).

46. 20 U.S.C. § 1401 (17) (1976).

47. See Matter of J. F., 398 N.Y.S.2d 125 (Family Ct., Queens County, 1977); Matter of Scott K., 400 N.Y.S.2d 289 (Family Ct., New York County, 1977). See also Education Daily, vol. 13, no. 238, December 10, 1980, p. 4.

48. See Barnes v. Converse College, 436 F. Supp. 635 (D.S.C. 1977); Crawford v. University of North Carolina, 440 F. Supp. 1047 (M.D.N.C. 1977).

49. Camenisch v. University of Texas, 616 F.2d 127 (5th Cir. 1980).

50. Id. at 135.

51. Southeastern Community College v. Davis, 442 U.S. 397 (1979).

52. Rowley v. Board of Educ. of the Hendrick Hudson School Dist., 483 F. Supp. 528 (S.D.N.Y. 1980), aff'd 632 F.2d 945 (2d Cir. 1980).

53. Id. at 532.

54. North v. District of Columbia Bd. of Educ., 471 F. Supp. 136 (D.D.C. 1979).

55. Matter of "A" Family, 602 P.2d 157 (Mont. 1979).

56. Id.

57. Gary B. v. Cronin, 3 EHLR 551:633 (N.D. Ill. 1980).

58. School Committee, Town of Truro v. Commonwealth of Massachusetts, 3 EHLR 552:186 (Ma. Super. 1980). Courts have also required occupational therapy to be provided for handicapped students as a related service. See Education Daily, vol. 13, no. 240, December 12, 1980, p. 5.

59. See Dady v. School Bd. for the City of Rochester, 282 N.W.2d 328 (Mich. App. 1979); Sherer v. Waier, 457 F. Supp. 1039 (W.D. Mo. 1977).

60. Tatro v. State of Texas, 481 F. Supp. 1224 (N.D. Tex. 1979), vacated and remanded, 625 F.2d 557 (5th Cir. 1980).

61. Education Daily, vol. 14, no. 13, January 21, 1981, p. 3.

62. Laura v. Special School Dist. No. 1, 3 EHLR 552:152 (D. Minn. 1980).

63. Crim v. McWhorter, 252 S.E.2d 421 (Ga. 1979).

64. See Education U.S.A., vol. 23, no. 3, September 15, 1980.

65. Warren L. Kreunen, "The Law and the Handicapped Student," paper presented at the National Organization on Legal Problems of Education Annual Convention, Boston, Massachusetts, November 14, 1980.

66. Springdale School Dist. v. Grace, 3 EHLR 552:191 (W.D. Ark. 1980).

67. Krawitz v. Commonwealth of Pennsylvania, 408 A.2d 1202 (Pa. Commw. 1979).

68. Isgur v. School Committee of Newton, 3 EHLR 552:197 (Mass. App. 1980).

69. Armstrong v. Kline, 3 EHLR 552:234 (E.D. Pa. 1980).

70. Kruelle v. Biggs, 489 F. Supp. 169 (D. Del. 1980).

71. Rowley v. Board of Educ. of the Hendrick Hudson School Dist., 483 F. Supp. 528 (S.D.N.Y. 1980).

72. Age v. Bullitt County Public Schools, 3 EHLR 551:505 (W.D. Ky. 1980).

73. In the Matter of Charles Hartman, No. 3-379 A60 (Ind. App. 1980).

74. See Monell v. New York City Depart. of Social Services, 436 U.S. 658 (1978); Maine v. Thiboutout, 100 S. Ct. 2502 (1980).

75. Owen v. City of Independence, Missouri, 100 S. Ct. 1398 (1980). While individual employees acting within the scope of official duties can still plead good faith as a defense, the Supreme Court has recognized that ignorance of well-established principles of law cannot be used to shield individuals from liability. See Wood v. Strickland, 420 U.S. 308 (1975). Also, the Court has noted that aggrieved plaintiffs need not plead that defendants acted in bad faith; the burden is on the defendants to introduce good faith immunity as a defense. See Gomez v. Toledo, 100 S. Ct. 1920 (1980).

76. See Hoffman v. Board of Educ. of the City of New York, 410 N.Y.S.2d 99 (App. Div. 1978), rev'd 424 N.Y.S.2d 376 (Ct. App. 1979); Peter W. v. San Francisco Unified School Dist., 131 Cal. Rptr. 854 (Cal. App. 1976).

77. Lora v. Board of Educ., 456 F. Supp. 1211, 1293 (E.D.N.Y. 1978).

78. See Education Daily, vol. 13, no. 140, July 18, 1980, pp. 3-4.

79. See Education Daily, vol. 14, no. 12, January 19, 1981, p. 5.

80. See Doe v. Grile, 3 EHLR 551:285 (N.D. Ind. 1979); Lora v. Board of Educ., 456 F. Supp. 1211 (E.D.N.Y. 1978); Frederick v. Thomas, 419 F. Supp. 960 (E.D. Pa. 1976), aff'd 557 F.2d 373 (3d Cir. 1977); Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972).

81. Mahoney v. Administrative School Dist. No. 1, 601 P.2d 826 (Ore. App. 1979).

82. Boxall v. Sequoia Union High School Dist., 3 EHLR 551:239 (N.D. Cal. 1979).

83. New York Ass'n for Retarded Children v. Carey, 3 EHLR 551:435 (E.D.N.Y. 1979).

84. See Education Daily, vol. 13, no. 225, November 19, 1980, p. 4.

85. In the Matter of Charles Hartman, No. 3-379 A60 (Ind. App. 1980).

86. Education Daily, vol. 14, no. 9, January 14, 1981, p. 4.

87. Education Daily, vol. 14, no. 14, January 22, 1981, p. 1.

88. For example, this assertion was made in connection with the Department of Education's proposed Lau Rules which would have required school districts to provide transitional bilingual education programs for all students with severe language deficiencies. Due to the massive reaction that the proposed regulations usurped the authority of local school boards to determine instructional offerings, Education Secretary Terrel Bell withdrew the Lau Rules in February, 1981. See Education Daily, vol. 14, no. 22, February 3, 1981, pp. 1-2.

89. McInnis v. Shapiro, 293 F. Supp. 327, 335 (N.D. Ill. 1968), aff'd mem. sub nom., McInnis v. Ogilvie, 394 U.S. 322 (1969). See also Burruss v. Wilkerson, 310 F. Supp. 572 (W.D. Va. 1969), aff'd mem., 397 U.S. 44 (1970).

90. Kern Alexander, "Financing Education in the 80's," UCEA Review, vol. xxi, no. 3, Fall, 1980, p. 8.

SUMMARIES OF SELECTED CASES

Halderman v. Pennhurst, 446 F. Supp. 1295 (E.D. Pa. 1977), aff'd in part, rev'd in part, 612 F.2d 84 (3d Cir. 1979).

Issue: Do institutionalized handicapped persons have a right to appropriate treatment in the least restrictive environment?

Facts:

1. Plaintiffs brought suit, alleging that Pennhurst State School and Hospital residents lived in inhumane and dangerous conditions, were subjected to unnecessary physical retraints, were provided improper medication and supervision, and were denied habilitative programs.

2. Plaintiffs argued that the Pennhurst conditions impaired rights protected by the eighth and fourteenth amendments, Section 504 of the Rehabilitation Act of 1973, the Developmentally Disabled Assistance and Bill of Rights Act, and Pennsylvania law.

3. The United States and Pennsylvania Association for Retarded Citizens were granted the right to intervene in the suit as plaintiffs seeking injunctive relief.

4. The federal district court ruled that the conditions at Pennhurst impaired residents' protected rights to nondiscriminatory habilitation and adequate treatment by the least restrictive means.

5. The court further ordered that Pennhurst eventually be closed and suitable community living arrangements and support services to be provided for all Pennhurst residents. The county and state were enjoined from recommending future commitments of mentally retarded persons to Pennhurst.

Holding: The appeals court affirmed the lower court's holding that residents of Pennhurst were being denied their federal and state rights, but reversed the lower court's order to close Pennhurst and bar further admissions.

Rationale: The appeals court reasoned that the environment at Pennhurst was unsanitary and hazardous and furthermore inconsistent with normalization principles. The hospital conditions impaired residents' federal statutory right to appropriate treatment and habilitation in the least restrictive environment [42 U.S.C. § 6010(1)]. However, the appeals court disagreed with the lower court's conclusion that Pennhurst never could provide adequate habilitation because of its very status as a large institution. Noting that institutions in general would not appear to be the least restrictive environment in which to provide habilitation, the court held that for some individual patients institutionalization may be necessary. Thus, the court concluded that Pennhurst, once dramatically improved, might provide an appropriate setting for some severely handicapped individuals. Accordingly, the appeals court vacated the part of the district court order which directed the closing of Pennhurst and banned any further admissions.

North v. District of Columbia Board of Education, 471 F. Supp. 136 (D.D.C. 1979).

Issue: Is a school board responsible for incurring the total costs associated with a residential placement for a handicapped child even though his problems are educational and noneducational in nature?

Facts:

1. In 1977 the school placement committee recommended placement of a multiply handicapped teenage boy in a residential treatment facility which would provide medical supervision, special education, and psychological support for the child.

2. After the Washington, D.C. Board of Education took no action to make the placement, a hearing officer ordered the board to place the child in a private residential facility (Elwyn) in Pennsylvania.

3. Due to the child's adjustment problems in the residential facility, his parents were notified that he would be discharged because the school could no longer deal with his emotional and other problems.

4. An alternative placement was sought from the board of education, but none was effected.

5. After two attempts to return the child to his parents, Elwyn authorities left the child at the Department of Human Resources from where he was taken to the mental health unit at the Washington, D.C. General Hospital.

6. The child's parents sought an injunction compelling the Washington, D.C. Board of Education to place the child in a residential facility. They alleged that the child was entitled to such a placement under the Education for All Handicapped Children Act of 1975, the Rehabilitation Act of 1973, and the Federal Constitution.

7. School officials asserted that while the child's emotional difficulties demand residential treatment, his educational needs can be met by attendance at a special education day program within the school district. They further argued that the child's emotional well-being was the responsibility of the Department of Human Resources rather than the school district.

Held: The federal district court ordered the Washington, D.C. Board of Education to support residential educational services for the child even though the child's problems were educational and noneducational in nature.

Rationale: The court noted that the Education for All Handicapped Children Act places the responsibility on the school board to administer all educational programs for handicapped children within its jurisdiction. Further support for this conclusion is found in the Rehabilitation Act of 1973 which stipulates that when residential care is required,

it must be at no cost to the parents. Recognizing that it may be possible in some situations to determine whether the social, emotional, medical, or educational problems of a child are dominant and to assign responsibility for placement and treatment to the agency operating in the major area, the court reasoned that in this case "all of these needs are so intimately intertwined that realistically it is not possible for the court to perform the Solomon-like task of separating them" (p. 141). Since the child was likely to suffer irreparable injury in the absence of an appropriate residential placement, the court ordered the board of education to support a residential academic program for the child with necessary psychiatric, psychological, and medical support and supervision.

Matter of "A" Family, 602 P.2d 157 (Mont. 1979).

Issue: Must the public school district support a private residential placement for a handicapped child, including the provision of psychotherapy services?

Facts:

1. Parents of a multiply handicapped child contended that he was severely emotionally disturbed, and that the school district was obligated to support a residential placement, including psychotherapy services needed by the child.

2. School officials asserted that the special education program in the county of the handicapped child's residence, aided by supplementary programs, was satisfactory to provide the child with a free appropriate education as mandated by federal and state law.

3. The school district further argued that psychotherapy was not properly allowable as a related cost for the child, and that such costs must be born by the child's parents or by a public agency other than the school district.

Holding: The court ordered the school district to place the child in the private facility and to bear the costs of psychotherapy services which are an allowable related service under the Education for All Handicapped Children Act of 1975.

Rationale: The court reasoned that the least restrictive environment for a child with severe emotional handicaps need not be in his home community if an appropriate program within the county is not available for the child. The court further noted that the term "free appropriate public education" means the provision of special education and related services necessary to meet the needs of individual handicapped children. While EHA stipulates that medical services can be provided only for diagnostic purposes, "psychological services" are not so limited to diagnosis. Relying on the dictionary definition of psychotherapy as "treatment of mental or emotional disorder or of related bodily ills by psychological means," the court concluded that psychotherapy comes within the meaning of the term "psychological services." The court rejected the argument that psychotherapy should not be supported by the school district as Montana law excludes this item as a service that must be provided for handicapped children. The court held that the federal regulation allowing for psychological services, which includes psychotherapy, overrides the state regulation.

Mahoney v. Administrative School District No. 1, 601 P.2d 826 (Or. App. 1979).

Issue: Is a hearing officer empowered to order a school district to support a year-round residential placement for a handicapped child in a private facility?

Facts:

1. Parents brought suit seeking a determination that a year-round residential placement was necessary for their handicapped child and that the school district was required to support the placement under the Education for All Handicapped Children Act and state law.

2. The hearing officer ordered the school district to pay the child's tuition for the year-round program, and district officials appealed to the state deputy superintendent of education.

3. The deputy superintendent affirmed the placement decision but ruled that the hearing officer had no authority to determine the responsibility for tuition payments.

Holding: The court ruled that the hearing officer was empowered to order the placement and to require the school district to pay the child's tuition in the year-round residential program.

Rationale: The court recognized that while Congress left "the definition of 'appropriate' education sufficiently loose to enable local legislatures and school officials to make appropriate programmatic decisions . . ., the Act plainly does not give the states and localities discretion over whether the appropriate education programs they develop are to be 'free'" (p. 829). Since both the hearing officer and deputy superintendent determined that a residential year-round program was necessary to meet the child's needs, the court concluded that the school district must pay the tuition costs associated with the placement. The court further noted that the issue of costs is necessarily determined by the placement decision. Therefore, the hearing officer, who has the authority to determine an appropriate placement for the child, also is empowered to direct the school district to pay tuition.

Armstrong v. Kline, 629 F.2d 269 (3d Cir. 1980).

Issue: Are severely handicapped children entitled to extended year programs?

Facts:

1. Five handicapped children and their parents sued the Pennsylvania Department of Education and various local school districts to compel school authorities to provide the children and members of their class with free special education programs for periods longer than the 180-day limit permitted by department of education policy.

2. The federal district court ruled that the 180-day rule violated the Education for All Handicapped Children Act by interfering with the federally-mandated goal of maximizing the self-sufficiency of all handicapped children.

Holding: The appeals court affirmed that the 180-day rule violated EHA.

Rationale: The appeals court reasoned that EHA places an obligation on state and local education agencies to develop goals and appropriate programs on an individual basis for all handicapped children. It disagreed with the district court's conclusion that the federal law prescribes a universal goal that public schools must maximize the self-sufficiency of all handicapped children. Nonetheless, the appeals court concluded that the 180-day restriction precluded the proper formulation of goals and programs for some severely handicapped children who might suffer substantial regression from an interruption in their educational programs.

Camenisch v. University of Texas, 616 F.2d 127 (5th Cir. 1980).

Issue: Is a deaf graduate student entitled to an interpreter to assist him in his classes?

Facts:

1. Plaintiff alleged that the University of Texas had failed to provide him with sign language interpreter services(in violation of Section 504 of the Rehabilitation Act) which would preclude completion of his master's degree.

2. Completion of a master's degree was a prerequisite to the plaintiff maintaining his current employment.

3. The federal district court granted the plaintiff a preliminary injunction but conditioned its relief on the plaintiff's filing an administrative complaint with HEW.

Holding: The appeals court affirmed the injunctive relief but vacated the lower court's order requiring the plaintiff to file an administrative complaint with HEW.

Rationale: The University of Texas is obligated to procure and compensate a qualified interpreter to assist the deaf graduate student who is an "otherwise qualified handicapped individual" protected from discrimination under Section 504. The court distinguished this case from Southeastern Community College v. Davis, 442 U.S. 397 (1979), in which the Supreme Court held that the college was not required to admit a deaf applicant to its nursing program or substantially alter its program to enable a deaf student to participate. In contrast, the appeals court reasoned that the deaf graduate student was an otherwise qualified handicapped person who was able to meet all of the program's requirements in spite of his handicap. Furthermore, the court reasoned that the requirement to exhaust administrative remedies is not applicable to private rights of action under Section 504; plaintiffs are under no obligation to pursue administrative remedies in Section 504 actions.

Rowley v. Board of Education of the Hendrick Hudson School District, 483 F. Supp. 528 (S.D.N.Y. 1980), aff'd 632 F.2d 945 (2d Cir. 1980).

Issue: Is a school district required to provide a sign language interpreter for a deaf student who is making above average progress without such special assistance?

Facts:

1. Parents of an eight-year-old deaf child brought suit under EHA to compel the school district to provide a sign language interpreter.

2. The child had rejected interpreter assistance during a trial period in kindergarten and had been making above average progress in the regular classroom without an interpreter.

3. Evidence indicated that under her current individualized program, the child was understanding only 59% of what transpires in the classroom, whereas with an interpreter she would understand 100%.

4. The federal district court ordered the school district to provide the interpreter. The court defined an appropriate education by applying a standard that would require each handicapped child to "be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children" (483 F. Supp. 534). The court concluded that while the child was receiving an adequate education, she was not being provided the opportunity to understand all that is said in the classroom.

Holding: The appeals court affirmed the lower court's decision.

Rationale: The appeals court reasoned that the Education for All Handicapped Children Act entitles the child to interpreter services to bring her educational opportunity up to the level of the opportunity being offered to her nonhandicapped peers. The court noted that all children do not comprehend 100% of what transpires in the classroom, but such lack of understanding is due to inattentiveness or inability. In contrast, the deaf child's reduced comprehension was directly related to her handicap, a condition for which the federal protections are specifically designed to provide remedies. However, the appeals court emphasized the narrow scope of its ruling. The case was not a class action suit, and the court noted that "the decision is limited to the unique facts of this case and is not intended as authority beyond this case" (632 F.2d 948).

Kruelle v. Biggs, 489 F. Supp. 169 (D. Del. 1980), aff'd __ F.2d __ (3d Cir. 1981).

Issue: Must a school district support a residential program for a profoundly retarded child?

Facts:

1. Parents of a profoundly handicapped child challenged the adequacy of the school district's proposed educational plan for the child under the Education for All Handicapped Children Act.

2. The school district recommended that the child be placed in a special day school operated by the district, but the parents asserted that the child required residential treatment.

3. After reviewing evidence presented at a hearing, the hearing officer ruled that the school district's proposed placement was appropriate to meet the child's needs.

4. The state level hearing review officer denied the parents' request to introduce additional evidence at a new hearing, and the parents initiated court action.

Holding: The court held that the school district must support treatment for the child in a residential facility.

Rationale: The court noted that EHA contemplates residential placement under some circumstances, and when such a residential placement is necessary for educational purposes, "the program, including non-medical care and room and board, must be at no cost to the parents of the child" (45 C.F.R. § 121a.302). The court rejected the assertion that the school district must be concerned with only the child's educational needs, leaving his social and emotional problems to be addressed by other agencies. Concluding that the child's combination of physical and mental handicaps necessitated a high level of consistency in programming, the court held that the child would realize his learning potential only in a residential environment. The court further recognized that while the state education agency can make arrangements with other state agencies in providing a free, appropriate public education for handicapped children, "the responsibility for coordinating these efforts and arrangements clearly lies with the state board of education" (p. 174).

Tatro v. State of Texas, 481 F. Supp. 1224 (N.D. Tex. 1979), vacated and remanded, 625 F.2d 557 (5th Cir. 1980).

Issue: Must the public school provide catheterization for handicapped children needing such services in order to participate in the school program?

Facts:
1. Parents of a child with a neurogenic bladder condition brought suit, alleging that the school district's failure to provide catheterization services for the child impaired rights protected by the Education for All Handicapped Children Act of 1975 and the Rehabilitation Act of 1973.

2. The federal district court denied the parents' motion for a preliminary injunction.

Held: The lower court ruling was vacated and remanded.

Rationale: The appeals court reasoned that catheterization is a related service which must be provided under the provisions of the Education for All Handicapped Children Act of 1975. The court noted that catheterization was necessary for the child to be present in the classroom and therefore was an essential support service required to assist the handicapped child benefit from special education. The court further recognized that the Rehabilitation Act of 1973 requires that individualized education plans include catheterization services if necessary to ensure that an otherwise qualified handicapped individual is not discriminated against on the basis of the handicap.

Stemple v. Board of Education of Prince George's County, 464 F. Supp. 258 (D. Md. 1979), aff'd 623 F.2d 893 (4th Cir. 1980), cert. denied, 49 U.S.L.W. 3617 (February 23, 1981).

Issue: Are parents entitled to reimbursement for tuition costs associated with private school education for their handicapped child if they have not exhausted administrative remedies to contest the public school's proposed placement?

Facts:

1. The county board of education initially placed a handicapped adolescent child in special education training and later decided to place her in a regular classroom for part of the school day.

2. The child's parents were dissatisfied with the child's progress in the latter setting and thus unilaterally removed the child and placed her in a private nonresidential school. The parents' decision was made before administrative appeal provisions of EHA were invoked.

3. The parents sought reimbursement of tuition costs associated with private school education from the board of education, and the federal district court denied relief.

Holding: The appeals court affirmed the lower court's decision.

Rationale: The appeals court noted that the Education for All Handicapped Children Act provides that while administrative appeal proceedings are in progress a child must remain in the current placement unless parties agree to an alternative interim placement. There is a duty on the part of parents to adhere to this stipulation and to avail themselves of remedies provided under the act for use in contesting a child's educational program. Since the parents acted unilaterally in placing the child in a private school, they were not entitled to the relief requested. The court dismissed the complaint because the parents failed to follow the proper procedures and thus did not offer an opinion on the merits of the parents' contentions regarding the deficiencies in the public school's placement for the child.